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No. 84-1404

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

DONALD R. HUENE and ANNETTE S. HUENE,
Petitioners,

vs.

UNITED STATES OF AMERICA and MARSHALL P. JENNINGS,
Revenue Agent,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

DONALD R. HUENE
ANNETTE S. HUENE
7429 N. Valentine
Fresno, Ca. 93711
Tel. (209) 431-1639
In propria persona

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

4 pp

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

With two exceptions, the Government presents no new arguments either in opposition to the Petition for a Writ of Certiorari or in support of the opinion of the Ninth Circuit. Virtually paraphrasing the appellate court opinion, the Solicitor General gives broad-brush treatment to the contentions raised by taxpayers in their petition.

New contentions, however, do appear in the Government's opposition. A comparison of what the United States now states with what the record and the Ninth Circuit below state reveals the following:

OPPOSITION BRIEF	DISTRICT COURT FINDING
"The District Director *agreed to let petitioners make* a verbatim stenographic record of the proceedings at their expense (*ibid.*)." Memo. Opp. 1. (emphasis added)	"[T]he District Director addressed a letter to respondent Donald R. Huene informing respondent that he had *instructed the Fresno office to make* a verbatim stenographic record of the examination process. . . . " Pet. App. A4 (emphasis added)

The argument that taxpayers thus " 'were offered other means of recording the audit' " (Memo. Opp. 2) carries less weight than the Government would want it to. This case deals with the "reasonable means elected *by taxpayers* or witnesses to take notes of proceedings. . ." (Pet. 8); it is taxpayers themselves who wish to make a "tape, stenographic or other verbatim recording[ ] of [the] examination proceeding[ ]." Pet. A14

II

The Government now places explicit reliance on Federal Rule of *Criminal* Procedure 53 (Memo. Opp. 2), reliance only implicit in its earlier argument to the Court of Appeals. (There the Government cited to Federal Rule of Civil Procedure 53 but quoted the Criminal Rule, citing numerous cases decided under the latter.)

The Government's reliance on Rule 52 has expanded, however:

OPPOSITION BRIEF	NINTH CIRCUIT OPINION
"[T]he courts have consistently denied the existence of any right to demand video coverage of judicial *or administrative hearings*. See, *e.g.*, *United States v. Hastings*, 695 F.2d 1278, 1280, 1283 (11th Cir.), cert. denied, 461 U.S. 931 (1983). . . ." Memo. Opp. 2-3 (emphasis added)	"Since there is no basic unfairness to taxpayers, their rights have not been violated. *Cf. United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir.) (no constitutional right to have *criminal trial* televised), *cert. denied*, 103 S.Ct. 2094. (emphasis added)

The Government fails to substantiate this new interpretation. Neither Rule 53, Fed. R. Crim. P., nor *Hastings* purports to apply to *administrative hearings* of a civil nature outside the confines of a federal courtroom and outside the context of a criminal trial in which criminal defendants seek "television coverage" or "video coverage." This new interpretation falls for reasons stated in the Petition. And it is not supported by the government's citation (Memo. Opp. 3) to the provisions of ch. 4245 of the Internal Revenue Manual; that administrative regulation does in fact apply to this case, but the Government can only revert to renewed discussion of the "other means" of recording the audit here that the IRS was "willing to permit taxpayers to use."

For the reasons stated in the Petition for a Writ of Certiorari, it is respectfully submitted that the Petition should be granted.

DONALD R. HUENE
ANNETTE S. HUENE,
Petitioners

May 1985